2017 IL App (2d) 150054-U
No. 2-15-0054
Order filed June 29, 2017



IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

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| THE PEOPLE OF THE STATE OF ILLINOIS,<br><br>Plaintiff-Appellee,<br><br>v.<br><br>DAVID KOMES,<br><br>Defendant-Appellant. | )<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>) | Appeal from the Circuit Court of Kendall County.<br><br><br><br>No. 04-CF-30<br><br>Honorable Melissa S. Barnhart, Judge, Presiding. |

JUSTICE BIRKETT delivered the judgment of the court.
Justices Hutchinson and Zenoff concurred in the judgment.

**ORDER**

¶ 1 *Held*: We could not hold that postconviction counsel provided unreasonable assistance: without access to the recording that counsel allegedly should have submitted with defendant's petition, we had to presume that counsel's failure to submit it was the product of sound judgment; likewise, without knowing the results of counsel's investigation into defendant's pro se claim, we had to presume that counsel stood on that claim (without amending it) because counsel properly concluded that the claim was frivolous.

¶ 2 Defendant, David Komes, appeals from the second-stage dismissal of his petition under the Post-Conviction Hearing Act (Act) (720 ILCS-1 *et seq*. (West 2006)). He asserts that he had inadequate assistance from postconviction counsel in shaping his postconviction petition. He

claims that counsel should have supported the amended petition with a specific recording that he contends would support his claim that he was framed. He also asserts that counsel failed to shape his claim into the appropriate legal form. We affirm.

¶ 3 I. BACKGROUND

¶ 4 The State charged defendant by information with six counts of predatory criminal sexual assault of a child (720 ILCS 5/12-14.1(a)(1) (West 2002)). The charges involved two victims: J.C., who was 11 years old at the time of trial, and J.C.'s half-sister, M.C., who was 8 years old at the time of trial.

¶ 5 The State moved under section 115-10 of the Code of Criminal Procedure of 1963 (Code) (725 ILCS 5/115-10 (West 2004)) to admit out-of-court statements that the victims had made to Bruce Ford (the father of M.C. and stepfather of J.C.), to Julie Ford (the mother of both victims), and to a specialist interviewer at the Children's Advocacy Center. The hearing on the State's motion took place before a judge other than the trial judge.

¶ 6 At that hearing, Bruce testified that, on December 26, 2003, M.C. came to him and told him that defendant (who sometimes babysat for the family) had directed her to engage in sexual activities with him. Further, "J.C. almost said the same thing as M.C." Bruce told the two that he would talk to their mother that night. He did not; he waited several nights. Neither of the girls spoke again to Bruce about the abuse. On cross-examination, Bruce agreed that he had made a statement on January 1, 2004, in which he had admitted that he was unsure of the date on which M.C. had spoken to him—it might have been December 28 or 29. On re-cross, defense counsel asked Bruce whether he had coached the victims on what they should say in the interviews at the Children's Advocacy Center. She also asked him whether he was aware of certain comments that M.C. and J.C. had made to the interviewer: both M.C. and J.C. told the

interviewer that Bruce had told them what to say; further, J.C. told the interviewer that she had forgotten some of the things that Bruce had told her to say. Bruce denied having coached the girls, and he said that he was not aware that they made such statements. He also explained that the police had never directly interviewed him—he had made a written statement on a form that Julie had brought for him from the police department.

¶ 7 Julie testified that J.C. had been 10 and M.C. had been 7 when they first reported the abuse. J.C. had started living full time with Bruce and Julie on September 20, 2003; before that, she had lived with Julie's mother. On December 30, 2003, Bruce told Julie to sit down and brought M.C. into the kitchen. With Julie's coaxing, M.C. said that defendant had had her touch his "private part." Julie reacted to hearing this by calling the police and then going to the police department to make a statement. Bruce did not come with her, but she brought him a statement form and told him to explain what the girls had said to him. Julie agreed that she had told a police officer that Bruce said that he had learned about the abuse on December 24, 2003. She also agreed that she had told the same officer that Bruce had been drinking and that she would have him write a statement when he was sober. She explained that Bruce had begun his drinking only after M.C. talked to Julie.

¶ 8 Jeffery Ackland, the officer with the Yorkville police who had accompanied Julie, M.C., and J.C. to the Children's Advocacy Center, also testified. He and at least two others had watched the interview through a one-way glass window. The Children's Advocacy Center recorded the interview, and Ackland took the original recording with him to the police department where he copied it for the use of the State's Attorney, defense counsel, and the guardian *ad litem*. Defendant tried to ask Ackland what the victims had told the interviewer, but the court sustained a State objection to the line of questioning, ruling that the recording itself was

better evidence of what the victims had said at the interviews. The court said that it "would review the tape as well at some point," and the State said that it was "offer[ing] the tape and giv[ing the court] a copy." The court "admitted [the recording] as State's Exhibit 1 for purposes of [section] 115-10."

¶ 9 The court heard the parties' arguments on the motion to admit the statements at a later hearing, but it assured the parties that it still had a copy of the recording. Defense counsel asked the court to bar Bruce's testimony on the basis that he had shown his memory to be unreliable and to bar Julie's testimony on the basis that she had elicited the description of abuse with leading questions. She asked that the court bar the interview tape based on the holding in *Crawford v. Washington*, 541 U.S. 36 (2004). Alternatively, she asked the court to bar it based on the victims' comments suggesting that Bruce had coached them:

> "One of the things that is most disturbing about that video tape is when I believe the older child stops in the middle of the interview and says that she forgot what daddy told her to say. I think, again, that destroys the credibility of any of these statements, factual basis, somebody's prompting them or telling them what to say or stories are being made up."

¶ 10 Counsel later moved to exclude or suppress other potential evidence including evidence that defendant, while a juvenile, had sexually assaulted two minors. (In both instances, the matters were not reported to the police until defendant was an adult.) She also moved to suppress a statement that he made to the Yorkville police, on the ground that he had intellectual impairments that prevented him from validly waiving his *Miranda* rights. However, when a court-ordered evaluation showed that he was of low-normal intelligence, had learning disabilities that particularly impaired his ability to understand spoken language, and did not understand the

concept of "rights" in the abstract but nevertheless did understand specific rights, counsel withdrew that motion.

¶ 11 The court made all its evidentiary rulings at one hearing. It conditionally excluded M.C. and J.C.'s out-of-court statements on the basis that they would merely be prior consistent statements, but noted that the statements might be admissible to rebut a suggestion that M.C. and J.C.'s trial testimony was newly fabricated. At that point, the court again assured the State that the "[t]ape [was] in the file." The court disallowed the prior-bad-acts evidence as excessively prejudicial.

¶ 12 Defendant had a jury trial. The jury saw a videotape of defendant giving an inculpatory statement to Yorkville police. M.C. and J.C. both testified, and under leading questioning to which defense counsel unsuccessfully objected, both described several incidents of sexual penetration by defendant. A medical witness described damage to J.C.'s hymen that was suggestive of sexual abuse. Both Julie and a jail cellmate of defendant's testified that defendant had admitted the incidents to them; the cellmate said that he had not received any deal for testifying and had been motivated to talk to the authorities as the result of an assault on his mentally handicapped sister. Yorkville police officers also testified that defendant had admitted the assaults but had stated that the victims had initiated them in part.

¶ 13 Defendant exercised his right to testify. He denied the truth of his admissions to the police, saying that he made them because he felt pressured. Nevertheless, under cross-examination, he stated that M.C. had taken her clothing off and pressured him to touch her. The jury found him guilty on all charged counts. Because two victims were involved, defendant received a nondiscretionary sentence of life imprisonment (see 720 ILCS 5/12-14.1(b)(1.2) (West 2002)).

¶ 14 On direct appeal, defendant asserted that the evidence was insufficient and that the court had allowed too much leading questioning of the victims. We rejected these claims. *People v. Komes*, No. 2-05-0246 (2006), (unpublished order under Supreme Court Rule 23).

¶ 15 After his direct appeal was complete, defendant filed a *pro se* postconviction petition containing what he categorized as 18 separate claims. His claim "C" is the primary one at issue in this appeal. The core of that claim is that Bruce was the actual abuser and that this was why Bruce had encouraged M.C. and J.C. to implicate defendant. Bruce's abuse of the two was also the reason for the sexualized behavior defendant had described in M.C. and J.C. Defendant supported his assertion that Bruce was the abuser with copies of two newspaper clippings. The first, apparently dated February 2, 2006, reported that Yorkville police had arrested Bruce on January 25, 2006, and that he had been charged with four Class X counts of sexual assault of a child. According to the clipping, "Yorkville Police said they made the arrest after investigating a complaint of an assault on a female child under the age of 13, who was known to [Bruce] at [Bruce's] home." The second clipping, dated February 19, 2006, was Bruce's death notice; it stated that he had "passed away" on February 15, 2006. Defendant alleged that Bruce's death was a suicide. Defendant further suggested that trial counsel's success in having the court exclude the recordings of M.C.'s and J.C.'s interviews had been deficient advocacy and had prejudiced him. He argued that the recording supported his claim that Bruce had persuaded both victims to implicate him instead of Bruce. In other claims, he asserted that trial counsel was ineffective for failing to seek further evaluation of his mental status and that the Yorkville police had coerced his confession. He finished by stating that he had other claims, but that his petition would be late if he included them.

¶ 16 Within 90 days of the petition's filing, the court ruled that the petition was not subject to first-stage dismissal; it therefore appointed private counsel for defendant. The court later substituted the public defender as counsel. The record shows seven appearances by three attorneys from the public defender's office on defendant's behalf. When the third attorney had not filed an amended petition despite multiple continuances, the State filed a motion to dismiss all claims. While the motion to dismiss was pending, the third attorney filed a motion to withdraw as postconviction counsel, which the court granted without hearing argument. Four months after allowing counsel to withdraw, the court heard and granted the State's motion to dismiss. Defendant timely appealed. In that appeal, we held both that counsel's motion to withdraw was insufficient under the standard of *People v. Greer*, 212 Ill. 2d 192 (2004), and that *Greer*'s alternative standard for affirming counsel's withdrawal was not satisfied in that the record did not show that counsel had complied with the standards of Illinois Supreme Court Rule 651(c) (eff. Dec.1, 1984). Consequently, we remanded the matter after vacating both counsel's leave to withdraw and the petition's dismissal. *People v. Komes*, 2011 IL App (2d) 100014.

¶ 17 On remand, the attorney who had moved to withdraw appeared on July 12, 2012, and told the court that she had "arranged for [defendant] to go over to the jail *** to view three videos." Counsel also reported further discussion with defendant. On April 17, 2013, a different attorney from the public defender's office appeared and reported that postconviction counsel had just had a "lengthy interview" with defendant and was investigating "several issues *** right now." On August 27, 2013, postconviction counsel asked for more time on the basis that she was still trying to track down a witness. On November 27, 2013, postconviction counsel told the court that she had "over-estimated [her] ability" to find the witness in the three months between the court dates. On January 29, 2014, postconviction counsel reported as follows:

> "We have finally located a witness and our private investigator has spoken with that witness and I received a report.
>
> I am now about three-quarters of the way finished with the post-conviction petition."

¶ 18 Postconviction counsel filed an amended petition on March 6, 2014. It "re-allege[d] and reasserte[d]" the *pro se* petition. It further developed five of those claims, none of which related to the contention that Bruce had pushed M.C. and J.C. to implicate defendant. The State again moved to dismiss all counts, and the court granted the motion. It ruled that most of defendant's of his claims—including claim C—were forfeited because he could have raised them on direct appeal or were *res judicata* because he had raised them. The court further ruled that, to the extent that defendant alleged trial counsel's ineffectiveness, the court did not need to decide whether defendant had suffered any prejudice, as counsel had performed competently. The court nevertheless further ruled that defendant had failed to make the necessary showing of prejudice. Counsel filed a motion to reconsider, and the court denied it. Defendant timely appealed. Counsel did not file a certificate pursuant to Rule 651(c), but, on February 2, 2017, the State filed counsel's certificate in this court with our leave.

¶ 19 II. ANALYSIS

¶ 20 On appeal, defendant asserts that "[t]his case should be remanded for further second stage proceedings because post-conviction counsel provided unreasonable assistance by failing to provide the trial court with the recorded interviews of J.C. and M.C." Further, "post-conviction counsel failed to shape [defendant's] claim—that [Bruce] manipulated the girls to incriminate the [defendant]—into 'appropriate legal form.' "

¶ 21 We start with a note on the trial record and the appellate record. We would not expect to find the tape of the interview from the Children's Advocacy Center in the record on appeal. Illinois Supreme Court Rule 608(a)(9) (eff. Dec. 11, 2014) provides that only exhibits admitted at trial and sentencing, or that were offered in proof, are part of the record on appeal. Even then, "physical and demonstrative evidence, other than photographs, which do not fit on a standard size record page" are not part of the record except on specific order. Ill. S. Ct. R. 608(a)(9) (eff. Dec. 11 2014). Because the tape was admitted only at the section 115-10 hearing and was not part of an offer of proof at trial, it is not a proper part of the record in any of defendant's appeals. We thus assume that the tape included in the record is the tape admitted at trial, which was the police interrogation tape. (We have not confirmed this, as the tape is in the Hi8 format and is not readily viewable anymore.) The record on appeal is thus not equivalent to the record in the trial court. The parties have not cited any authority that addresses the trial court's retention of rejected evidence, and we thus express no opinion on whether the tape ought to be a part of the trial court record. However, we here give defendant the benefit of the assumption that the tape was not "part of the record" in the trial court.

¶ 22 With that state of the record in mind, we address the merits of defendant's claims. We conclude that defendant has not shown that postconviction counsel's assistance was less than reasonable. The right to postconviction counsel is purely statutory, and the supreme court has held that a postconviction petitioner is entitled only to "reasonable" assistance. *E.g.*, *People v. Hardin*, 217 Ill. 2d 289, 299 (2005). "To ensure that postconviction petitioners receive this level of assistance, Rule 651(c) imposes specific duties on postconviction counsel." *People v. Suarez*, 224 Ill. 2d 37, 42 (2007). Rule 651(c) provides that, when the trial court appoints counsel:

> "The record filed in that court shall contain a showing, which may be made by the certificate of petitioner's attorney, that the attorney has [(1)] consulted with petitioner *** to ascertain his *** contentions of deprivation of constitutional rights, [(2)] has examined the record of the proceedings at the trial, and [(3)] has made any amendments to the petitions filed *pro se* that are necessary for an adequate presentation of petitioner's contentions." Ill. S. Ct. R. 651(c) (eff. Feb. 6, 2013).

Included in these standards is a requirement to seek evidentiary support for claims raised in the postconviction petition. *People v. Johnson*, 154 Ill. 2d 227, 245 (1993). Our review of whether postconviction counsel provided adequate assistance is *de novo*. *People v. Jones*, 2017 IL App (4th) 140594, ¶ 31.

¶ 23 Defendant first argues that counsel unreasonably failed to support his petition with the recording of the victims' interview. But we cannot evaluate this claim, as the recording is unavailable to us. The only record indication of the recording's contents is trial counsel's argumentative description of a single aspect. Obviously, we cannot rely on that description to hold that postconviction counsel was unreasonable for failing to submit it. We cannot presume that something not before us would have been of aid to defendant. See *People v. Perkins*, 229 Ill. 2d 34, 51 (2007).

¶ 24 Put another way, without the recording, we must presume that postconviction counsel's failure to submit the recording was the product of sound judgment. See *People v. Parker*, 288 Ill. App. 3d 417, 422 (1997) (counsel is presumed competent). Certainly, during the pretrial proceedings, both defense counsel (in moving to exclude the recording) and the State (in objecting) believed that the recording incriminated defendant. Notably, defendant does not assert that his counsel's belief was unreasonable. Here, we must presume that postconviction

counsel's failure to submit the recording resulted from a similar conclusion. Of course, Bruce's indictment might place the recording in a different light, but that speculative possibility does not establish that counsel erred.

¶ 25 Our conclusion is similar as to defendant's second argument; we cannot fault postconviction counsel for merely adopting defendant's *pro se* claim. The record indicates that counsel conducted a thorough investigation, even deploying a private investigator, in an attempt to find evidence to support defendant's claim. Without knowing the results of that investigation, we must presume that counsel stood on defendant's *pro se* claim because she had properly concluded that the claim was a mirage. See *People v. Greer*, 212 Ill. 2d 192, 205 (2004) (counsel need not amend a petition only to further a frivolous claim).

¶ 26 III. CONCLUSION

¶ 27 For the reasons stated, we affirm the petition's dismissal. As part of our judgment, we grant the State's request that defendant be assessed $50 as costs for this appeal. 55 ILCS 5/4-2002(a) (West 2016); see also *People v. Nicholls*, 71 Ill. 2d 166, 178 (1978).

¶ 28 Affirmed.